



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 2003 OF 2017

MARTIN ORAMISI OTWANE.....CLAIMANT

VERSUS

ESLONS PLASTICS OF KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 6th October 2017 and filed in court on even date, the Claimant sued the Respondent for unlawful dismissal and settlement of terminal dues. The Respondent defended itself by a Response dated 20th August 2018 and filed in court on 4th September 2018.

2. At the trial, the Claimant testified on his own behalf and the Respondent called three (3) witnesses; the Factory Manager, Patrick Maina Njoroge; Accounts Assistant, Kennedy Kyalo Musava and Supervisor-Crusher Section, Victor Abere Mutange.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent, as a Machine Operator in June 2009. He claims to have earned a daily wage of Kshs. 600.

4. The Claimant avers that upon reporting to work on 1st May 2016, he was denied access into the Respondent's premises by the security guards, and was therefore forced to go back home. The Claimant adds that he was denied access again on 2nd May 2016.

5. The Claimant states that he requested and was allowed to speak to the Respondent's Manager, Patrick Njoroge in a bid to seek an explanation for the denial of access but the Manager ordered security guards to escort the Claimant out of the Respondent's premises and further ordered the guards never to allow the Claimant access into the premises.

6. The Claimant avers that during his entire period of service with the Respondent, he never went on leave nor was he paid in lieu thereof. He adds that he was not provided with housing and was not paid house allowance.

7. The Claimant pleads that the Respondent's action of denying him access into the work premises and further having him escorted out by security guards amounted to unlawful and unfair summary dismissal. He therefore claims the following:

- a) 1 month's salary in lieu of notice.....Kshs. 18,000
- b) House allowance for 84 months.....226,800
- c) Leave pay for 7 years.....126,000
- d) Service pay for 2009-2014 (when NSSF was not remitted).....54,000
- e) Partly unremitted NSSF dues (June 2014-May 2016).....57,000
- f) 12 months' salary in compensation for unlawful dismissal.....216,000

g) Costs plus interest

The Respondent's Case

8. In its Response dated 20th August 2018 and filed in court on 4th September 2018, the Respondent states that the Claimant was first employed as a casual labourer in the Sales Department, Loading Section on 9th October 2009.

9. The Respondent denies that the Claimant was employed as a Machine Operator, at a monthly salary of Kshs. 18,000.

10. The Respondent further denies that the Claimant was denied access into the work premises on 1st and 2nd May 2016. The Respondent states that it did not have any operations on the said dates.

11. The Respondent maintains that the Claimant was a casual employee and was therefore not entitled to the benefit of leave or pay in lieu thereof. The Respondent avers that the Claimant was paid his daily wages, inclusive of house allowance, as regulated by the relevant law on minimum wage.

12. The Respondent denies summarily dismissing the Claimant and states that the Claimant himself voluntarily left employment on his own volition on 3rd June 2016.

13. The Respondent denies the Claimant's entire claim and puts him to strict proof.

Findings and Determination

14. There are three (3) issues for determination in this case:

- a) The nature and status of the Claimant's employment;
- b) Whether the Claimant has made out a case of wrongful dismissal;
- c) Whether the Claimant is entitled to the remedies sought.

Nature and Status of Claimant's Employment

15. The Respondent's position is that the Claimant was a casual employee earning a daily wage. On his part, the Claimant testified that he worked throughout from Monday to Saturday.

16. Section 2 of the Employment Act defines a casual employee as:

“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.”

17. In its decision in *Reef Hotel Limited v Josephine Chivatsi [2021] eKLR*

this Court stated the following:

“...the defining feature of casual employment is not payment based on a daily wage, as opposed to a monthly salary, but rather a continuous employment period of less than a month or piece work performed within an aggregate period of less than three months. This then is the essence of Section 37 of the Employment under which the Court can infer a term contract.”

18. In support of its position that the Claimant was a casual employee, the Respondent produced a muster roll and another document titled 'Casual Contract, Accounts Dept'. The muster roll was however not signed and the Respondent's witnesses told the Court that the 'Casual Contract' was a supporting document for payment of wages.

19. What is more, these documents did not cover the entire period of the Claimant's employment with the Respondent. Further, the Respondent did not produce an attendance register to prove its contention that the Claimant worked intermittently.

20. On the whole, I find and hold that the Respondent did not prove its assertion that the Claimant was a casual employee.

Wrongful Dismissal?

21. The Claimant states that he was locked out of the Respondent's premises on 1st May 2016 and adds that this action amounted to summary dismissal, without recourse to due process.

22. While denying this assertion, the Respondent states that the Claimant, who was a casual employee, voluntarily left employment on 3rd June 2016. The Respondent's witnesses however referred to an incident on the said date, where the Claimant is said to have reported on duty

while intoxicated. The witnesses told the Court that the Claimant had to be escorted out of the Respondent's premises, by security guards.

23. There was no evidence that the Claimant was summoned to answer to either the charge of absconding duty or reporting to work while intoxicated. It follows that none of the charges was proved and the only conclusion to make is that the Claimant's employment was terminated without a valid reason as required under Section 43 of the Employment Act and in violation of the due procedure set by Section 41 of the Act.

Remedies24. In light of the foregoing findings, I award the Claimant seven (7) months in compensation. In arriving at this award, I have considered the Claimant's length of service and the Respondent's unlawful conduct in the termination transaction.

25. I further award the Claimant one (1) month's salary in lieu of notice.

26. The Respondent states that the Claimant was not allowed to go on leave, ostensibly because he was a casual employee. In light of the contrary finding in this regard, the claim for leave pay succeeds and is allowed.

27. From the evidence on record, the Respondent did not remit any National Social Security Fund (NSSF) dues in favour of the Claimant until 2014 and subsequently, the remittances were erratic and inconsistent. It seems to me therefore that the Respondent did not consider NSSF as a serious retirement safety net for the Claimant. I therefore award the Claimant service pay for his entire period of employment.

28. The Claimant also asks for house allowance. However, by his own admission, he was paid a daily wage, which would ordinarily be inclusive of house allowance. This claim therefore fails and is disallowed.

29. Finally, I enter judgment in favour of the Claimant as follows:

a) 7 months' salary in compensation.....	Kshs. 126,000
b) 1 month's salary in lieu of notice.....	18,000
c) Leave pay for 7 years (600*21*7).....	88,200
d) Service pay for 7 years(600*15*7).....	<u>63,000</u>
Total.....	<u>295,200</u>

30. This amount will attract interest at court rates from the date of judgment until payment in full.

31. The Claimant will have the costs of the case.

32. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF MARCH 2022

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JUDGE

Appearance:

Mr. Namada for the Claimant

Miss Mavindu h/b Mr. Maluki for the Respondent